

WATER ALLOCATION PROGRAM DEVELOPMENT WATER RIGHTS COMMITTEE MEETING

MINUTES OF MEETING December 5, 2002

Members Present:

Dale Thompson
Al Bettencourt
Brian Bishop
Christopher D'Ovidio
Caroline Karp
Ken Payne

WRB Staff Present:

Kathleen Crawley
Connie McGreavy

Members Absent:

Terry Tierney
Kendra Beaver
Fred Crosby
Mary Ellen McCabe
Rebecca Partington
Paul Ryan
Jon Schock
Greg Schultz
John Spirito

I. CALL TO ORDER:

With a quorum present, Prof. Thompson called the meeting to order at approximately 2:10 P.M.

II. APPROVAL OF MINUTES:

The minutes of the October 17, 2002 and October 31, 2002 meetings were approved. Regarding the format of the minutes, members suggested that the discussion section be a summary of discussion, with a separate document listing more specifically what was said and by whom, when necessary. This would enable a more efficient review of the minutes before approval. The other, more detailed document could be revised, as necessary.

III. ITEMS FOR ACTION

Ms. McGreavy reiterated the need for members to become familiar with the Regulated Riparian Model Water Code as a basis for discussion at the next full meeting of the Water Allocation Program Advisory Committee meeting.

IV. ITEMS FOR DISCUSSION:

A. Re-examination of the Mission of the Committee

The committee discussed its general mission. Water Resources Board staff pointed out that other committees are simultaneously investigating some of the items that the Water Rights/Regulatory Authority Committee has been discussing. Refocusing the committee can help prevent overlapping the work of other committees, which can otherwise lead to conflicts between the committees and duplication of efforts. Members suggested that an initial "groping" process is useful, and that the committee must initially look broadly at many issues. In terms of specifics, some suggested the need to remember federal statutes and regulations in addition to state legislation, regulation, and doctrines. The Regulated Riparian Model Water Code may also help the committee focus. One thing that is helpful about the code is the broad considerations listed as the policy concerns that underlie it (Chapter 1).

B. Introduction to Regulated Riparian Model Code

Professor Thompson highlighted many different sections of the code, and suggested further examination of the code by the members. In doing so, the code would serve as a starting point, not an end-point. It is recommended that this committee and others identify possible modifications of the code in areas that might make it fit better with the particular conditions of Rhode Island. The background of the development of the code, through the American Society of Civil Engineers in 1997, was also discussed. The committee that put this together included legal scholars and practitioners from around the country. Joseph Dellapenna, a law professor at the University of Pennsylvania, led this effort. It is noted that this particular code was designed to be applied almost exclusively to states (mostly in the Eastern United States) that currently operate under riparian doctrines. It does include references in many places to instances where different states have adopted portions of the code—frequently with locally appropriate modifications.

C. Clarification of Misconceptions and Confusions in Terminology

The committee discussed a misinterpretation of wording used in a document that served as the basis of a brief committee report at the previous committee-as-a-whole meeting. The document read “any new system would respect riparian rights.” The better way is to say that this committee is interested in ensuring that operation of the new system is not a taking of existing property rights in water.

Confusion also arose over the terms, “reasonable use,” “beneficial use,” and “reasonable and beneficial use.” The term “reasonable use” is used in conjunction with riparian systems. The term “beneficial use” is used in conjunction with prior appropriation systems. The term “reasonable and beneficial use” is used in reference to the Californian rights system. This last term appears in Article X, Section 2 of the Californian Constitution, and its usage began in response to conflicts that arose due to the particular mixed riparian and appropriative water rights structure of California [see *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81 (1926), and its aftermath.].

There also seemed to be confusion over the terms “priority” and “prior appropriation system.” “Priority” simply refers to determining, in times of shortage, which parties get first access to water, and who comes next, and so on. The “prior appropriation system” sets up a specific hierarchy based solely on time of when an appropriation permit is granted. However, this is only one way to determine priority, and Rhode Island can consider a number of methods of determining priority. In fact, the committee was reminded that determining priority of uses is the principle task of the Priority Uses Committee.

D. Public Trust

Committee members had a discussion (which was continued through later emails) over the applicability of the public trust doctrine. This discussion included the reach of the federal public trust doctrine, state public trust doctrine emanating from the Rhode Island Constitution, and the applicability of the public trust doctrine to groundwater and other water bodies. It should be noted that the first declaration of policy in the Regulated Riparian Model Water Code refers to the “public interest,” a broader category than public trust.

E. Data Analysis

Professor Karp presented some of her data analysis of water usage. In particular, she pointed out that while domestic withdrawals are predominant in the Blackstone area, in the Wood-Pawcatuck, agricultural withdrawals are a close equal to domestic withdrawals, and there can thus be significant differences in the application of water rights between the two areas.

F. Development of Diagrams

In addition to this data, Professor Karp also presented preliminary versions of some water use diagrams showing the connection between water quality and quantity (bad quality water will reduce the quantity available). A diagram showing the regulatory structure is also being prepared.

V. OTHER BUSINESS:

The next meeting was scheduled for 2:00 P.M. on January 9, 2003.

VI. ADJOURNMENT:

The meeting adjourned at approximately 3:30 P.M.

Respectfully submitted,

Dale Thompson
Roger Williams University School of Law

Connie McGreavy
RI Water Resources Board

**Note: For more information on Water Allocation, visit: <http://www.seagrant.gso.uri.edu/scc/wrb/index.html>.*